

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

IN THE ST CHRISTOPHER & NEVIS FEDERATION

CASE SKNHCR 2021/0006

REGINA

V

VG

APPEARANCES

Mr Tessaun Vasquez and Ms Lanein Blanchette for the Crown.

Dr Henry Browne QC, Mr Ogrenville Browne, and Ms Marissa Hobson for the defendant.

2021: SEPTEMBER 29

RULING

**On whether the Magistrate not establishing if girl aged 15 is competent to give evidence
renders committal void and therefore the indictment a nullity**

- 1 **Morley J:** VG is being tried for indecent assault in February 2018 on EC when she was then 14¹. He is said to have lain behind her on her bed and pressed his erect penis into the small of her back. There was case management on 03.06.21, 10.06.21, 21.09.21 and 24.09.21, his pleading not guilty on 10.06.21. The jury was sworn yesterday on 28.09.21, and then senior defence counsel Dr Henry Browne QC, of much ability, sought to argue the trial should stop because of

¹ The parties will not be identified as the complainant is entitled to anonymity and the defendant was later acquitted by the jury.

a flaw in the committal proceedings. I have ruled against him, promising written reasons, which are these.

- 2 Before saying more, the court wishes to impress on counsel in this trial, and generally through the jurisdiction of the ECSC, that it is not acceptable practice to raise so fundamental a matter so very late. The purpose of the case management hearings is to identify issues for forethought and argument, which would include whether the committal proceedings were flawed, so that the point can be properly weighed, researched and adjudicated. There has been the feeling of ambush, not only of the Crown but of the Court, which had slotted the case into the list for trial some months ago. Where a point is expected to be taken, leaving the point to be taken late is to be frowned upon, as it means there is a danger the point is not properly aired, but instead designed to be aired later in the Court of Appeal if needed, while in parallel, if successfully taken then swearing a jury may have been wasted.
- 3 On the subject of not airing the point properly, at first yesterday it was offered to the court the argument would be EC's evidence was 'completely inadmissible', which was to make the point wrongly: the point is instead whether the committal proceedings were flawed so that the indictment based on them is a nullity. Better preparation would have made for better argument, which comes back to why an issue should be flagged early so it can be properly argued.
- 4 What has happened is, as part of the committal proceedings, EC made a deposition to the Magistrate on 05.11.19 when she was six days shy of turning 16. Under relevant law on St Kitts, the **Evidence Act 2011** cap 3.12 says:

Competence of children under sixteen years of age.

13. (1) Where a child who is under sixteen years is presented as a witness, the court shall conduct an inquiry to determine if the child is possessed of sufficient intelligence to justify the reception of the child's evidence, and to determine if the child is competent to know the nature and consequences of giving false evidence and to know that it is wrong to give false evidence, and if the court so finds, it shall permit the child to give evidence upon taking the affirmation or oath.

- 5 It appears the Learned Magistrate made no enquiry of her competence, when she provided the only probative evidence, so that Counsel Browne QC, as explained, now seeks to stop the jury trial. Of interest is at the committal hearing VG was represented by junior counsel Ogrenville Browne, who said nought to alert the Magistrate to possible flaw but seeks though his senior to take the point now, though not then.
- 6 This feature begs further concern. Counsel are reminded they are officers of the court, not just representing a party, being therefore not hired guns to win anyway how, and if a procedural flaw arises, seen by counsel, there is a duty to the court to raise it, rather than let it fall into error, hoping to take the point later as a 'gotcha'. This court has been assured Counsel Ogrenville Browne was not hiding the point, and accepts this, though it must mean by implication, along with the Magistrate and prosecutor, he did not see it. It appears all parties proceeded on the basis it was a proper committal. In principle it is arguable not raising the point was to concede the committal proper, meaning obiter to take the point now at the High Court may be inappropriate as estopped.
- 7 However, I do not make this finding in fact or law, but instead proceed as follows.
- 8 In support of his argument, Counsel Browne QC referred to **R v Charlesworth Joseph 2016 DOMHCR2016/0005**, which was not immediately to hand in court but passed up later. In this case, being an elegant judgment by my sister colleague Charles-Clarke J, there had been an unrepresented defendant at committal for unlawful sexual intercourse and indecent assault on a girl aged 9, whose competence was not examined under Dominica's **s28 Children and Young Persons Act** cap 37.50, which says, concerning any child under 14:

Where in any proceedings against any person for any offence, any child of tender years called as a witness does not in the opinion of the court understand the nature of an oath, his evidence may be received, though not given on oath, if in the opinion of the court he is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth; and his evidence, though not given on oath, but otherwise taken and reduced into writing in accordance with the **Magistrate's Code of Procedure Act** or this Act, shall be deemed to be a deposition; but where evidence admitted by virtue of this section is given on behalf of the prosecution the accused is not

liable to be convicted of the offence unless that evidence is corroborated by some other material evidence in support thereof implicating him.

- 9 In the *Joseph* case, under the Act uncorroborated testimony of an unsworn child under 14, being of 'tender years', would lead to acquittal. To make enquiry was essential else demonstrable prejudice might arise to the defendant, removing a safeguard against unsafe conviction. The instant case is distinguishable, as the witness was older being almost 16, being evidently not of 'tender years', and not a child as defined by that Dominica Act.
- 10 Moreover, reliance in the arguments before Charles-Clarke J was placed on **Matthews v Regina 2001 3LRC400**, a judgment of De La Bastide CJ of Trinidad & Tobago, where the learned judge quoted from **Neil v North Antrim Magistrates Court 1992 97 CrAppR121**, being a judgment of Lord Mustill. In Lord Mustill's analysis, the effect of a bona fide but mistaken ruling on a procedural matter has to raise '*real prejudice*', going on then to identify specifically on the facts of the *Neil* case '*the admission of the inadmissible evidence was not a harmless technical error but was an irregularity which had substantial adverse consequences for the applicant and that accordingly the court should have intervened to quash the committal.*' In the *Matthews* case De La Bastide CJ opined:
- ...what I take from the judgement of Lord Mustill that is useful in deciding the issue before us, is that in the case of some irregularities at any rate, whether there has been a breach of natural justice or a want of due process will depend not merely on the nature of the irregularity but on the particular circumstances of each case which determine whether the irregularity has resulted in 'demonstrable prejudice' to the person complaining of it. That is not to say that there are not procedural rules which are so fundamental that breach of them will automatically and inevitably produce the consequence that the proceedings in which they occur and any order in which they culminate, are void and of no effect....
- 11 In consequence the ruling of the learned Chief Justice in the *Matthews* case is that where there is a procedural flaw, the proceedings are voidable, but not automatically void, while adjudication as to whether the flaw should lead to void depends on demonstrable prejudice.
- 12 The judgment of Charles-Clarke J in the *Joseph* case did not state anywhere a failure at committal to examine a child's competence renders proceedings automatically void. As I understand the judgment, the reflection of the learned judge on the materials before her led to

ruling the committal void, having first considered it voidable and whether it should be, which makes complete sense where a child aged 9, obviously therefore of 'tender years', has been allowed to offer a deposition before an unrepresented defendant, when the committal would arguably have failed if examined because her unsworn evidence would have been uncorroborated.

- 13 In the instant case, VG was represented at the committal, and EC was just shy of 16, not below 14, with the effect of uncorroborated unsworn testimony not arising. Common sensibly, a girl almost 16 is highly likely to be '*competent to know the nature and consequences of giving false evidence and to know that it is wrong to give false evidence*', as **s13 Evidence Act** contemplates, so that realistically here no demonstrable prejudice arises. This means, though voidable, the committal proceedings can properly be said not to be void because here the flaw is purely technical, and in the teeth of experienced counsel Ogrenville Browne not taking the point before the Magistrate.
- 14 For these reasons I rule the committal proceedings are not void and in consequence the indictment is not a nullity, so that the trial shall proceed.

The Hon. Mr. Justice Iain Morley QC
High Court Judge
29 September 2021